No. 05-35569; 05-35646 & 05-35570

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION; et al,

Plaintiffs-Appellees,

v.

NATIONAL MARINE FISHERIES; et al,

Defendants-Appellants,

and

NORTHWEST IRRIGATION UTILITIES; et al,

Defendant-Intervenors,

v.

STATE OF OREGON,

Plaintiff-Intervenor-Appellee.

STATE OF OREGON'S APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon

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APPELLEE'S BRIEF OF THE STATE OF OREGON

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. That court entered its preliminary injunction on June 10, 2005. Intervenor-defendant BPA Customer Group timely filed its notice of appeal on June 13, 2005. Federal defendants timely filed their notice of appeal on June 15, 2005. Intervenor-defendant State of Idaho timely filed its notice of appeal on June 17, 2005. This court has jurisdiction under 28 U.S.C. § 1292(a)(1).

QUESTIONS PRESENTED

Oregon does not appear on this appeal either in support of or in opposition to the district court's injunction. Oregon intervened as a plaintiff in this case to challenge the 2004 biological opinion issued by the National Marine Fisheries Services—now known as NOAA-Fisheries (NOAA)—for ongoing operations of the Columbia and Snake River federal dams. That intervention was based on Oregon's strong, sovereign interest in ensuring that the dams are operated lawfully, with due respect for the protections afforded threatened and endangered species under federal law.

The district court ruled that the biological opinion is invalid. That ruling is not directly before the court on this appeal, but federal defendants do, in effect, collaterally attack it. Oregon appears solely in defense of that ruling.

Consistent with the limited purpose of Oregon's appearance, Oregon's description of the questions presented is limited to the legal issue of the biological opinion's validity.

It is undisputed that the Endangered Species Act (ESA) requires consultation and issuance of a biological opinion for ongoing operation of the Columbia and Snake River dams. The purpose of the biological opinion is to ensure that the proposed federal action does not jeopardize the continued existence of protected salmon and steelhead, and that it does not destroy or adversely affect critical habitat. The primary issue before the district court was the validity of the 2004 biological opinion for those dam operations. The challenged injunction was predicated in part on the court's summary-judgment ruling that the biological opinion is not valid. With respect to that predicate issue, four questions are presented, correlating with the four grounds on which the district court held the biological opinion invalid.

I. Scope of the consultation.

A biological opinion is generally required for an action that is authorized, funded, or carried out by a federal agency. Where consultation is required for an ongoing federal action, does the ESA allow a consultation limited to the effects of only the discretionary component of the ongoing action, or does it require consultation on the effects of the entire ongoing action?

II. Consideration of the proposed action in its aggregate context.

NOAA's regulations implementing the ESA, as well as its ESA Section 7 Consultation Handbook, expressly require that a jeopardy analysis consider the effects of the proposed action, added to the environmental baseline and cumulative effects in the action area, all viewed in light of the status of the species. NOAA's past biological opinions for the Columbia and Snake River dams have followed that methodology. The 2004 biological opinion, however, adopts a new methodology that permits a "no jeopardy" conclusion without any effective consideration of the environmental baseline and the status of the species. Does the ESA itself permit a jeopardy analysis that deliberately attempts to view the effects of the action in isolation, divorced from the aggregate context in which the action occurs? And even if the ESA itself would permit that methodology, may NOAA adopt a new methodology for analyzing jeopardy, inconsistent with its regulations and past practices, without following appropriate rulemaking procedures, and without providing a reasoned explanation for its diversion from past practice?

III. Consideration of effects on recovery as part of the jeopardy analysis.

NOAA's regulations provide that to "jeopardize" a species' continued existence means to reduce appreciably the likelihood of the species' survival and recovery. Consistent with that regulation, may NOAA lawfully decline to

consider an action's effects on the prospects for recovery, provided it considers the effects on survival?

IV. The critical habitat analysis.

As part of a biological opinion, NOAA must explain whether the proposed action will destroy or adversely modify critical habitat necessary for recovery. Does the 2004 biological opinion satisfy that standard where, among other things, it declines to analyze what habitat conditions are necessary for recovery, and where it assumes that an adverse modification of critical habitat in the short-term may be excused by anticipated improvements in the longer term?

STATEMENT OF THE CASE

I. Nature of the case, course of proceedings, and disposition in the court below.

The State of Oregon intervened as a plaintiff in this case to challenge the 2004 biological opinion for operation of the Columbia and Snake River federal dams. Oregon and the other plaintiffs (the NWF plaintiffs) argued that the biological opinion was defective on various grounds, including that it applied an unlawful methodology for analyzing "jeopardy" under the ESA. Following a hearing on cross-motions for summary judgment, the district court granted Oregon's and the NWF plaintiffs' motions for summary judgment, and denied the defense motions.

During the pendency of those cross-motions, the NWF plaintiffs also amended their complaint to state claims against the Bonneville Power Administration, the Army Corps of Engineers, and the Bureau of Reclamation (collectively, the action agencies). Based on that amended complaint, the NWF plaintiffs further moved for a preliminary and permanent injunction with respect to the action agencies' dam operations. Unlike the NWF plaintiffs, Oregon has not asserted claims against the action agencies and did not participate in briefing on the motion for injunction. Following hearing, the district court granted, in part, the NWF plaintiffs' motion for injunction.

Federal defendants now appeal from that injunction. They contend that—contrary to the district court's summary-judgment ruling—the 2004 biological opinion is lawful, and, therefore, the NWF plaintiffs did not establish a sufficient likelihood of success on the merits to support a preliminary injunction. Oregon appears at this stage of the proceedings solely to oppose federal defendant's contention that the biological opinion is lawful.

II. Statement of facts.

A. The ESA listings of Columbia and Snake River salmon and steelhead.

In December 1991, NOAA listed the Snake River sockeye as an "endangered" species under the ESA. There are now a dozen populations of Columbia and Snake River salmon and steelhead listed as threatened or

endangered. *See Nat'l Wildlife Fed'n v. NMFS*, 254 F. Supp. 2d 1196, 1200 (D. Or. 2003).

B. The framework for analyzing jeopardy under the previous biological opinions for the Columbia and Snake River dams.

The first biological opinion for the Columbia and Snake River dams was issued in 1992. Since then, NOAA has issued new opinions from time to time.[1]

As discussed more thoroughly in Oregon's argument below, over that history, a settled methodology for analyzing "jeopardy"—founded in the ESA itself, in NOAA and the Fish and Wildlife Service's joint ESA regulations, and in their ESA Section 7 Consultation Handbook—has emerged. That settled methodology considers whether the effects of the proposed action, added to the environmental baseline and any cumulative effects, viewed in light of the status of the species, would jeopardize the species' continued existence.

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[1] Each biological opinion in the series may be paired with the litigation to which it gave rise. The 1992 opinion was challenged in *Pac. N.W. Generating Coop. v. Brown*, 822 F. Supp. 1479 (D. Or. 1993), *aff'd*, 25 F.3d 1443 (9th Cir. 1994). The 1993 opinion was reviewed in *Idaho Dept. of Fish & Game v. NMFS*, 850 F. Supp. 886 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995). Then the 1995 opinion effectively was at issue in *ALCOA v. BPA*, 175 F.3d 1156 (9th Cir. 1999) and in *Am. v. NMFS*, No. 96-384-MA, 1997 U.S. Dist. LEXIS 5337 (D. Or. April 3, 1997). Finally the 2000 opinion was reviewed in *Nat'l Wildlife Fed. v. NMFS*, 254 F. Supp. 2d 1196 (D. Or. 2003).

That methodology was employed most recently in the 2000 biological opinion. There, NOAA explained that it would first analyze the biological requirements and the status of the species, and then it would

> [d]etermine whether the species can be expected to survive with an adequate potential for recovery under the effects of the proposed or continuing action, the effects of the environmental baseline, and any cumulative effects, and considering measures for survival and recovery to other life stages[.]

Supp. E.R. 1 (2000 Biological Opinion at 1-8). If the species would not be expected to survive with an adequate potential for recovery, then NOAA would apply that same framework to determine whether a reasonable and prudent alternative action was possible that would avoid jeopardy. Supp. E.R. 1-2 (2000 Biological Opinion at 1-8 to 1-9).

C. The framework for analyzing jeopardy in the 2004 biological opinion.

The 2004 biological opinion departs from that heretofore-settled methodology. The 2004 biological opinion instead posits a hypothetical "reference action"—supposedly designed to exercise all available discretion for the benefit of listed fish—and then compares the effects of that reference action to the effects of the proposed hydropower operations. That difference is taken to quantify the adverse effects to listed species of the discretionary hydropower component of the proposed action.

The 2004 opinion then considers the effects of the mitigation component of the proposed action to determine whether the proposed action as a whole—including both the hydropower component and the mitigation component—has any "net adverse effects" on listed fish. Under this new framework, so long as the effects of the mitigation are determined to "offset" the adverse effects of the dam operations, a "no jeopardy" conclusion must follow. In those circumstances, the status of the listed species and the environmental baseline play no part in the effective jeopardy analysis. *See* 2004 Biological Opinion at 1-12 and 8-1.[2]

SUMMARY OF ARGUMENT

The ESA requires consultation on certain actions—undisputedly including operation of the federal dams at issue here—authorized, funded, or carried out by federal agencies. Neither the ESA nor NOAA's regulations provides support for parsing the federal action, as defendants propose, to segregate the discretionary component for consultation.

Similarly, the ESA and NOAA's regulations require a jeopardy analysis that views the proposed action in its aggregate context. The 2004 biological opinion impermissibly departs from that settled methodology and instead seeks

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[2] The 2004 Biological Opinion is a part of federal defendants' excerpt of record, beginning at Fed. E.R. 578.

to isolate the effects of the action. Contrary to controlling law, the new methodology renders the aggregate context for the action functionally irrelevant.

Furthermore, the applicable regulations expressly require that the jeopardy analysis consider the effects of the action on the likelihood of a species' survival and recovery. The 2004 biological opinion unlawfully declines to do so, based on an unreasonably constrained and hypertechnical interpretation. A jeopardy analysis cannot lawfully omit consideration of the effects of the action on a protected species' prospects for recovery.

Finally, the ESA and applicable regulations require a reasoned analysis of whether the action will destroy or adversely affect critical habitat. The 2004 biological opinion fails to deliver any explanation with respect to key aspects of that analysis.[3]

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[3] The district court's summary-judgment opinion of May 26, 2005, relies on each of those grounds to hold the 2004 biological opinion invalid. Federal defendants suggest, however, that the grounds on which this court may conclude the biological opinion is invalid are limited by the district court's Opinion and Order of June 10, 2005. Federal Defendants' Reply in Support of Emergency Motion at 10 n. 7. But the June 10 Opinion expressly notes that the court's "prior rulings * * * [are] more fully set forth in [the] prior opinion and order issued on May 26, 2005." Opinion and Order, dated June 10, 2005, at 2. In any event, this court should affirm the district court's ruling as to the validity of the biological opinion if there are any grounds available to do so. *See, e.g., Rivero v. City and County of San Francisco*, 316 F.3d 857, 862 (9th Cir. 2002).

ARGUMENT

As in the court below, Oregon takes no position on the propriety of the challenged injunction. Oregon's appearance at this stage of the proceedings is necessitated, however, by federal defendants' continued insistence on the lawfulness of a biological opinion that approves proposed federal dam operations without ever considering whether those dams will extirpate protected salmon and steelhead.

On this expedited preliminary-injunction appeal, the court need not and should not reach the merits of the district court's ruling that the biological opinion is invalid. In that respect, this court need only observe that the district court did not abuse its discretion by concluding for purposes of the preliminary injunction—based in part on its summary-judgment ruling—that movants were likely to prevail on the merits. If this court does, however, address the substance of the summary-judgment ruling, for the reasons discussed below, that ruling was correct.

I. The district court correctly held that consultation is required on the entire ongoing action.

Federal defendants contend that the 2004 biological opinion properly limits the scope of consultation to the discretionary component of the dam operations, and that the opinion lawfully excludes consideration of the effects of the dams themselves. They assert that, in the context of this continuing

action, consultation is required only as to the specific component of the action with respect to which residual discretion exists.

Certainly, nothing in the ESA supports that contention. By the plain terms of the statute, so long as the action is "authorized, funded, or carried out" by a federal agency, NOAA must opine as to whether it will result in jeopardy to a listed species or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2), (b). The Columbia and Snake River dams are a continuing federal action, within the ambit of that section.

NOAA's ESA Section 7 Consultation Handbook further confirms that the effects of the entire ongoing action—including the existence of the dams—must be considered in determining whether the proposed action will result in jeopardy or adverse modification of critical habitat. The Handbook specifically describes the appropriate scope of consultation on a "proposed or continuing" hydropower action. NOAA must consider the "effects of all past activities, including effects of the past operation of the project," which are added to the impacts of the proposed action. Handbook at 4-28 to 4-29.[4] That previously well-settled framework for analysis is consistent with the ESA regulations. *See*

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[4] Excerpts from the ESA Section 7 Consultation Handbook, including the cited pages, are included in the NWF plaintiffs' excerpt of record. E.R. 274 *et seq.*

50 C.F.R. § 402.02[15][5] and 50 C.F.R. § 402.14. Under those rules, the effects of the dams must be considered—whether as part of the baseline or otherwise as part of the effects of the action—in the jeopardy analysis.

Federal defendants now suggest, however, that 50 C.F.R. § 402.03 requires isolation of the discretionary component of the action for purposes of consultation. That regulation provides simply, "Section 7 * * * appl[ies] to all actions in which there is discretionary involvement or control." In light of federal defendants' concession that this continuing action does include discretionary involvement or control, the regulation merely confirms that consultation is required. It does not limit the *scope* of consultation to the discretionary component of the federal action. Federal defendants' reliance on that regulation is not based on a plausible reading of its text.

Nothing in the statute or the regulations supports circumscription of the scope of consultation to only the discretionary component of the continuing action. Under the controlling provisions, consultation is required on the entire continuing federal action.[6] The district court correctly so held.

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[5] Section 402.02 provides definitions in an unnumbered paragraph format. Oregon has supplied bracketed numbers to represent the location of cited paragraphs in that sequence.

[6] This court recently discussed the relationship between a federal agency's consultation obligations under Section 7 of the ESA and the scope of

Footnote continued...

II. The district court correctly held that the effects of the action must not be viewed in isolation.

A. The 2004 biological opinion unlawfully avoids consideration of the status of the species and the environmental baseline.

Before now, it had been well-settled that a jeopardy analysis considers the effects of the proposed action in the context of any cumulative effects, the environmental baseline, and the status of the species. The 2004 biological opinion, however, employs a radical, new methodology for analyzing jeopardy.

Unlike past biological opinions, the analysis in the 2004 opinion proceeds, in effect, as follows: (1) posit a "fish-friendly" reference action and estimate the effects of that action on listed fish; (2) estimate the effects of the "hydro" portion of the proposed action on listed fish; (3) arithmetically determine the survival difference between the reference action and the proposed hydro action; (4) determine the beneficial effect of proposed mitigation; and (5) arithmetically determine whether any adverse effects of the proposed hydro

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(...continued)
the agency's discretion under other applicable law. *See Washington Toxics Coalition v. EPA*, ___ F.3d ___ (9th Cir. June 29, 2005). There, the court rejected the federal defendants' argument that the agency's scope of discretion under other statutes limits its obligation to consult under the ESA. Slip Op. at 7736-39. Instead, where the agency has "ongoing discretion" to act for the benefit of a listed species, the ESA's obligations apply and are not excused by limitations under other law. *Id.* That holding is at odds with federal defendants' assertion on this appeal, similar to the federal defendants' position in *Washington Toxics Coalition*, that the scope of their consultation obligation is limited by other law.

action are offset by the effects of the mitigation. So long as there are no "net adverse effects" under that calculus—as was the case with respect to several species considered in the 2004 opinion—the baseline and the status of the species do not come into the effective jeopardy analysis.

In the district court, Oregon argued that a proper jeopardy analysis *must* take into account—as the previous biological opinions for these dams took into account—the environmental baseline, the cumulative effects in the action area, and the status of the species. In response, both in the district court and in this court, federal defendants refer to that once-prevailing methodology as "aggregation," which they now deny is required.

In fact, the regulations do require consideration of the effects of the action in an aggregate context. A "biological opinion" is defined by regulation as the document stating whether a proposed action is likely to jeopardize the existence of a listed species or adversely modify its critical habitat. 50 C.F.R. § 402.02[6]. The phrase, to "jeopardize the continued consistence of" is defined as, to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02[19].

The regulations further set forth the framework to analyze jeopardy. They provide that, as part of the formal consultation, NOAA must "[f]ormulate its biological opinion as to whether the action, taken together with cumulative effects,[7] is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4). The "effects of the action" are defined to include its direct and indirect effects, which are to "be added to the environmental baseline." 50 C.F.R. § 402.02[15]. The environmental baseline includes the "past and present impact of all Federal, State, or private actions and other human activities in the action area," as well as anticipated effects of proposed federal actions that have undergone consultation, and the impacts of contemporaneous State or private actions. *Id.* Those regulations unambiguously require consideration of the action in an aggregate context.

And if the plain terms of the regulations were not clear enough, then NOAA's Handbook expressly settles the question. In that Handbook, NOAA *emphasizes* that a jeopardy determination must analyze "*the aggregate effects* of the * * * environmental baseline, effects of the action, and cumulative effects

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[7] Cumulative effects are defined as "those effects of future State or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02[10].

in the action area—* * * viewed against the status of the species[.]" Handbook at 4-31 (emphasis in original).[8] And specifically with respect to consultation for ongoing hydroelectric projects, the Handbook requires NOAA to determine "the total effects" of all past activities, including the effects of the project, "added to" the effect of the proposed action. *Id.* at 4-28 to 4-29.

In accord with those provisions, recent biological opinions, issued following notice-and-comment procedures, uniformly have applied the interpretation of the ESA contained in the regulations and the Handbook to analyze whether proposed management of the Columbia and Snake River dams will cause jeopardy. Both the 1995 and the 2000 biological opinions expressly followed that methodology. Thus, NOAA's own regulations, its Consultation Handbook, and its past practice all contemplate that the jeopardy analysis considers the effects of the action, added to the environmental baseline, viewed in light of the status of the listed species.

Contrary to that legally settled methodology, however, the 2004 biological opinion's framework deliberately isolates the effects of the action and ignores the status of the species and the environmental baseline. Because the opinion finds that mitigating measures offset the survival difference

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[8] As noted above, pertinent excerpts from the Handbook are included in the NWF plaintiffs' excerpt of record. E.R. 274 *et seq.*

between the reference action and the proposed action for several listed species, the jeopardy analysis effectively disregards the species' status and the baseline.

But NOAA is not at liberty to flout its own rules. An agency is bound to follow its own regulations, even where the regulations require procedures not otherwise statutorily or constitutionally mandated. *See Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003), *rev'd on other grounds, sub nom, Tenet v. Doe*, 125 S.Ct. 1230 (2005); *see also Wagner v. United* States, 365 F.3d 1358, 1361 (D.C. Cir. 2004) ("We begin with the initial premise that an agency is bound by its own regulations."). The new jeopardy framework is invalid on the ground that it violates NOAA's own duly promulgated regulations, in particular 50 C.F.R. § 402.02[15] and 50 C.F.R. § 402.14(g). NOAA must follow those rules unless and until it duly promulgates different rules.

An agency also is required to follow its own precedents, or to explain its reasons for any departure. *See, e.g., ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious."); *see also Friends of the Wild Swan v. USFWS*, 12 F. Supp. 2d 1121 (D. Or. 1997) ("An agency acts arbitrarily when it departs from its precedent without giving good reason."). NOAA's new framework is a clear departure from its previous interpretation of the ESA, as set forth in the

Consultation Handbook and in the 1995 and 2000 biological opinions for these dams. The only reason suggested for departing from precedent is the district court's decision holding the 2000 biological opinion invalid. But the idea that that the district court's decision somehow required—or even suggested—NOAA's new framework is spurious. Nothing in that opinion even hinted that NOAA should on remand supplant its settled framework for analyzing jeopardy.

B. Precedent further supports the requirement of "aggregation."

One need look no further than prior litigation over the ESA's application to the Columbia and Snake River dams to find a clear and eloquent statement that jeopardy must be analyzed in the given context of the species' current deficit situation:

> NMFS correctly viewed incremental improvements as insufficient to avoid jeopardy in light of the already vulnerable status of the listed species. We agree with NMFS that the regulatory definition of jeopardy, i.e., an appreciable reduction in the likelihood of both survival and recovery, 50 C.F.R. § 402.02, does not mean that an action agency can "stay the course" just because doing so has been shown slightly less harmful to the listed species than previous operations. Here, *the species already stands on the brink of extinction, and the incremental improvements pale in comparison to the requirements for survival and recovery.*

ALCOA v. BPA, 175 F.3d 1156, 1162 n. 6 (9th Cir. 1999) (emphasis added); *see also Idaho Dept. of Fish & Game v. NMFS*, 850 F. Supp. 866, 899 (D. Or. 1994) ("Especially in light of the perilously low numbers of Snake River

Sockeye and fall chinook expected in 1993 * * *, I also find that [NOAA] should have fully considered the enhanced risks associated with small populations").

Furthermore, the cases cited by federal defendants do not support their position that a jeopardy determination properly may be made in such a manner that the baseline and the status of the species serve only as a "backdrop," but do not actively bear on the analysis. Indeed, those cases confirm that a proper jeopardy analysis must evaluate the effects of the action in the context of the environmental baseline and the status of the species.

Federal defendants first cite *S.F. Baykeeper v. United States Army Corps of Eng'rs*, 219 F. Supp. 2d 1001 (N.D. Cal. 2002). There, however, the court expressly held—citing *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001), a case relied on below by Oregon—that "the consulting agency must consider" the environmental baseline, and must "determine [] the effects of the action with reference to this 'environmental baseline.'" *Id.* at 1022-23.

Similarly, in *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1216-17 (D. Idaho 1993), *aff'd* 42 F.3d 1399 (9th Cir. 1994), the court recognized that the effective jeopardy analysis must consider the environmental baseline. Indeed, the court expressly held that the jeopardy determination must

evaluate the effects of the action, "given the present environmental baseline." *Id.* at 1217.

The cases cited by federal defendants do not support their position. Indeed, those cases confirm that NOAA cannot lawfully perform a jeopardy analysis that foregoes effective consideration of the context for the action, including the environmental baseline and the status of the species.

C. Consideration as a "backdrop" is not adequate.

Federal defendants nevertheless seek to defend the 2004 biological opinion on the ground that it does examine the status of the species and the baseline "as a backdrop" for the jeopardy analysis. In effect, after adopting a new jeopardy framework that renders examination of those elements moot, NOAA would take credit for nevertheless faithfully undertaking that bootless exercise. Insofar as the baseline and the status of the species are required elements of the jeopardy analysis, a construction that renders those elements inert should be disfavored.

This court should reject NOAA's new construction of the jeopardy requirement, under which the baseline and the status of the species are merely a "backdrop" for the effective analysis with respect to several listed species. It is not possible sensibly to analyze whether an action will cause jeopardy while disregarding the context in which the action occurs.

III. The district court correctly ruled that recovery is pertinent to an appropriate jeopardy analysis.

The 2004 biological opinion unlawfully disavows federal responsibility under Section 7(a)(2) of the ESA for recovery of listed salmon and steelhead. The jeopardy standard used in the 2004 opinion would be satisfied so long as the effects of the action do not appreciably reduce the chance of the listed species' *survival*, regardless of how those effects may bear on the prospects for *recovery*. That new standard is contrary to the applicable regulations and the rule of *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059 (9th Cir. 2004).

> The regulations define "jeopardize the continued existence of" as
>
> to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *survival and recovery* of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. 402.02[19] (emphasis added).

Federal defendants cynically argue that an appreciable reduction in the prospects for recovery does not offend that standard, provided prospects for survival remain intact, based on the regulation's use of the conjunctive phrase. This court, like the district court, should reject that unreasonably strained interpretation.

Furthermore, insofar as the regulation does not require consideration of recovery, the regulation itself is invalid under *Gifford Pinchot*. In that case, this court struck down the regulatory definition of "destruction or adverse

modifications of critical habitat," because the definition limited "adverse modifications" to those modifications that would impair *both survival and recovery*. *Gifford Pinchot*, 378 F.3d at 1069-75. That definition, the Ninth Circuit held, would permit modifications of critical habitat that impair recovery but not survival. *Id.* The same logic should apply with equal force to the regulatory definition of jeopardy, which—like the adverse-modification rule—provides that an action causes jeopardy only if it appreciably reduces the prospect for *both survival and recovery*.

Ultimately, the identical phrase in the two provisions suffers the identical defect. Impairment of the potential for recovery must be considered when evaluating jeopardy, just as impairment of the potential for recovery must be considered when evaluating degradation of critical habitat. The 2004 biological opinion improperly fails to take recovery into account.[9]

IV. The biological opinion's analysis and conclusions with respect to critical habitat are flawed.

To summarize the 2004 biological opinion's critical habitat analysis: (1) safe downstream passage through the dams is an element of critical habitat; (2) with respect to protected Snake River spring/summer chinook, as an

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[9] As the district court explained, that does not mean a jeopardy analysis must include a specific "recovery plan" under 16 U.S.C. § 1533(f). Opinion and Order, dated May 26, 2005, at 35 n. 14.

example, the operation of the dams will significantly reduce this element of critical habitat during the first five years; (3) during the second five-year period, structural improvements in the dams are expected to significantly improve safe passage; and therefore (4) the net effect on critical habitat is not adverse. That analysis assumes that critical habitat does not need to be considered critical in the short term, so long as it is replaced—hopefully before extinction—in the longer term.

NOAA's optimistic assumption that there will be long-term improvements is ill-founded and unrealistic. Moreover, even if that assumption were reasonable, NOAA's focus on the long term fails to address the legal standard for adverse modification of critical habitat in the shorter term.

In effect, NOAA finds the proposed action will result in a period of significant reduction in a key element of critical habitat—safe passage—but nowhere states whether that will appreciably reduce the likelihood of survival or recovery of protected species. The biological opinion is defective for its failure to analyze the short-term adverse effects on critical habitat in the context of the species' life cycles and migration patterns. The district court correctly struck down the biological opinion on those grounds.

CONCLUSION

Consistent with its position below, Oregon takes no position on the ultimate disposition of the present appeal. Oregon's appearance at this stage of these proceedings is necessitated, however, by the federal defendants' collateral attack on the district court's summary-judgment ruling. To the extent that the propriety of that ruling is pertinent to this court's consideration of the present appeal, the district court's summary-judgment decision should be sustained.

Respectfully submitted,

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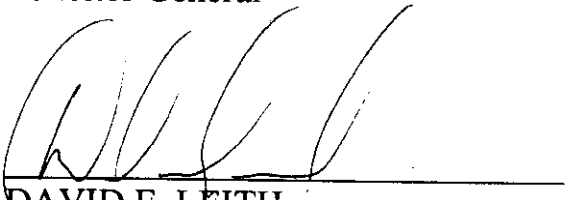

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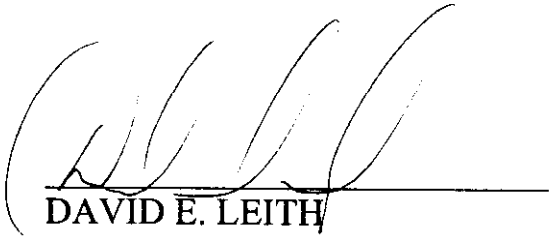
CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the State of Oregon's Appellee's Brief is proportionately spaced, has a typeface of 14 points or more and contains 5,259 words.

DATED: June 30, 2005.



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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION; et al, Plaintiffs-Appellees, v. NATIONAL MARINE FISHERIES; et al, Defendants-Appellants, and NORTHWEST IRRIGATION UTILITIES; et al, Defendant-Intervenors, v. STATE OF OREGON, Plaintiff-Intervenor-Appellee.	U.S.C.A. No. 05-35569; 05-35646 & 05-35570 STATEMENT OF RELATED CASES

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intervenor-appellee, certifies that he has no knowledge of any related cases pending in this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I directed the original State of Oregon's Appellee's Brief to be filed with the Clerk of Court by overnight service to, U.S. Court of Appeals, Ninth Circuit, at P.O. Box 193939, San Francisco, California 94119-3939, and served upon the following parties on June 30, 2005, by mailing two copies, with postage prepaid, in an envelope addressed to:

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